

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1438-CR

Cir. Ct. No. 2011CF4871

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANNETTE MORALES-RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. Annette Morales-Rodriguez appeals a judgment entered on a jury verdict convicting her of two counts of first-degree intentional homicide

with the use of a dangerous weapon, contrary to WIS. STAT. § 940.01(1)(a) & (b) and 939.63(1)(b) -(2011-12),¹ and an order denying her postconviction motion seeking a new trial based on alleged ineffective assistance of counsel. Morales-Rodriguez contends the trial court erred when it denied, without a hearing, her motion alleging she was denied her structural² constitutional right to have the attorney of her choice after her three attorneys, who originally volunteered to represent her *pro bono*, withdrew from the case due to potential conflicts of interest. She also contends that the three attorneys' withdrawal from her representation constituted ineffective assistance of counsel. Because Morales-Rodriguez forfeited her right to appeal the right to counsel of her choice by not raising this issue earlier, and her motion did not allege facts sufficient to warrant an evidentiary hearing on her claim of ineffective assistance of counsel, we affirm.

BACKGROUND

¶2 In October 2011, Morales-Rodriguez killed a pregnant woman and cut her baby out of the woman's womb with the intent to pretend it was her own. The baby did not survive. Morales-Rodriguez was charged with both homicides. While she was in jail, Attorney Robert D'Arruda volunteered to represent Morales-Rodriguez and enlisted Attorneys Patrick Rupich and Michael Torphy to assist him. The State filed a "motion to waive conflict" asserting that all three volunteer attorneys had potential conflicts: Milwaukee County was prosecuting Rupich for his third drunk driving offense, Torphy was representing Rupich in that

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² A structural error is one so fundamental that its violation requires automatic reversal. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-46, 149 n.4 (2006).

case, and D'Arruda was the victim in a domestic violence case then pending in Milwaukee County. The State asserted:

The State asserts that a waiver of a possible conflict by defendant Annette Morales-Rodriguez is needed for the case to move forward with present counsel. The conflict that can potentially be asserted in Mr. Rupich's cases is that if there is an unfavorable result to Ms. Morales, that Mr. Rupich was trying to gain favor from the district attorney's office by performing less than possible to curry favor from the district attorney's office to get a more favorable result in the pending cases.

The same argument can be made about those attorneys representing Mr. Rupich. It can be argued that they also may perform less than possible, in order to get a more favorable outcome from the district attorney's office for Mr. Rupich.

Pertaining to Mr. D'Arruda's case where he is a victim, it can be asserted that Mr. D'Arruda has a possible conflict to perform less than possible to gain a favorable advantage for the outcome of his case.

¶3 The trial court held a hearing on the motion and asked Morales-Rodriguez if her attorneys had explained the conflict to her. She answered: "a little bit" "[t]hat there is a conflict -- conflict between the two attorneys" but "I don't know what it is in relation to." Morales-Rodriguez's attorney told the court that he had not discussed the conflict issue with Morales-Rodriguez before the day of the hearing—he "just mentioned [it] to her a few minutes ago in the bull pen." The trial court admonished defense counsel and explained:

One of the things a trial court does is try to tie off loose ends that could be used on appeal not to prevent anyone's exercise of their rights but to make sure that a case is adjudicated fairly and properly. This is clearly a potential -- significant, potential conflict, and I'm exceedingly disappointed, counsel, that when this was raised three weeks ago, and again you and your colleagues had time to talk to the media about it but you don't speak to Miss Morales-Rodriguez until five or 10 minutes ago when

she's sitting in my bull pen? That causes the Court great concern, yes.

¶4 The trial court rescheduled the hearing to give the defense attorneys an opportunity to discuss the potential conflicts and see if Morales-Rodriguez would waive them. Before the next hearing, however, the defense attorneys filed a joint motion to withdraw as counsel for Morales-Rodriguez saying they “believe a fresh start would be in the best interests of our client” to allow her “conflict[-]free” representation. The attorneys explained the bases for the motion:

- “[T]here are very important waivers of conflict of interest that the Court is requiring Annette Morales-Rodriguez to waive in writing as it concerns attorney Robert D’Arruda and attorney Patrick Rupich. By doing so, Annette Morales-Rodriguez would be waiving some of her very important constitutional appellate rights. We do not want her to give up any of her appellate rights at this time.”
- They believed Morales-Rodriguez had a dual-personality disorder that would interfere with her ability to sign a valid waiver of the conflicts.
- They were concerned that a loss would create an appellate issue that the attorneys “tank[ed] the case to curry favor with the Milwaukee County District Attorney’s Office” for the attorneys’ pending cases.

¶5 At the hearing, the trial court asked Morales-Rodriguez about the withdrawal motion. She responded that she “want[ed] them to be my attorneys because as up to now I don’t believe there’s any conflict of interest.” The trial court granted the motion to withdraw ruling “there’s certainly clearly possible conflict, potential conflict” and “that due to the possible conflicts, due to the

possible issues relative to the waiver, due to some other matters beyond everything I've already said I think it's appropriate in this case that in some ways a reset button is used and the case proceeds to go forward in a more clean fashion."

¶6 The State Public Defender then appointed two attorneys to represent Morales-Rodriguez and the case proceeded to trial, after which the jury found her guilty of the charges. In her postconviction motion, Morales-Rodriguez raised for the first time that her volunteer attorneys acted ineffectively when they withdrew and their withdrawal violated her structural constitutional right to have counsel of her choice. She did not allege that her public defender attorneys were ineffective in how they represented her at trial or that they were ineffective for not raising the issue that she raises here. The trial court denied the motion without a hearing because "a reasonable basis existed for granting counsels' motion to withdraw," and the facts in this case do not create a structural constitutional error because *the court* did not deprive Morales-Rodriguez of the counsel of her choice.

DISCUSSION

¶7 Morales-Rodriguez argues the trial court should have held an evidentiary hearing on her claim that the volunteer attorneys' withdrawal was ineffective assistance of counsel because she was deprived of the right to counsel of her choice. In determining whether her motion alleges facts sufficient to require a hearing, we recite the law regarding the structural constitutional right to counsel of one's choice and the law pertinent to an ineffective assistance of counsel claim. The "Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he [or she] is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006)

(citation omitted). Improper denial of that right is a structural error requiring automatic reversal; however, the right to counsel of one's choosing is not absolute, and may be limited by the circuit court to ensure a fair trial and the integrity of the judicial system. *Id.* at 147 n.3; *see also State v. Miller*, 160 Wis. 2d 646, 652-53, 467 N.W.2d 118 (1991). If the chosen counsel's representation creates an actual conflict or a potential conflict, the circuit court has the discretion to disqualify the chosen counsel. *Miller*, 160 Wis. 2d at 653; *Wheat v. United States*, 486 U.S. 153, 159-64 (1988). Moreover, defendants do not have a right to counsel of their choice when that attorney is not willing to represent them or when that attorney has a conflict of interest. *State v. Peterson*, 2008 WI App 140, ¶13, 314 Wis. 2d 192, 757 N.W.2d 834.

¶8 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. *Id.* The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to our independent review. *Id.* The defendants bear the burden of proving both that counsel's performance was deficient and, if so, such performance prejudiced their defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Defendants must overcome a strong presumption that their counsel acted reasonably within professional norms. *Johnson*, 153 Wis. 2d at 127. Counsel's performance is not deficient if there is no objection to an issue that

has no merit. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Prejudice is proven when the defendant shows that his counsel’s errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See Strickland*, 466 U.S. at 687.

¶9 The trial court must conduct an evidentiary hearing when a postconviction motion alleges facts that, if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). “Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.” *Id.* at 310. “[T]he circuit court has the discretion to deny a postconviction motion without a hearing” “if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.” *Id.* at 309-11 (quoted source and quotation marks omitted).

A. *Forfeiture.*

¶10 As a preliminary matter, the State argues that Morales-Rodriguez forfeited the right to raise the “right to counsel of one’s choice” issue on appeal because her appointed attorneys did not raise the issue before trial.³ We agree.

¶11 The right to appeal the denial of the right to counsel of one’s choice may be forfeited if a timely objection is not made. *See State v. Pinno*, 2014

³ The State also argues that Morales-Rodriguez forfeited the right because her volunteer attorneys did not raise the issue. This argument does not make sense under the facts of this case. The volunteer attorneys moved to withdraw. Had they raised the right to counsel issue, it would have created a scenario where they were asking to withdraw, but telling the court that Morales-Rodriguez has the right to keep them as her attorneys. This would create an impossible scenario.

WI 74, ¶¶7-8, 56-64, 356 Wis. 2d 106, 850 N.W.2d 207 (ruling that defendant must timely object to structural constitutional right to public trial). To preserve this objection, Morales-Rodriguez was required to make this argument before the start of her trial. Instead, she waited until after she was convicted to complain. “It would be inimical to an efficient judicial system if a defendant could sit on [her] hands and try [her] luck” with her appointed attorneys “only to argue after [her] conviction that [her] Sixth Amendment right” to counsel of her choice had been violated. *See id.*, ¶7 (a defendant cannot take a wait and see attitude with structural constitutional claims).

¶12 Because Morales-Rodriguez forfeited her “right to counsel of my choice” claim as a structural constitutional violation when failing to timely raise the issue, our review on appeal is limited to whether she raised sufficient facts in her motion to show that her volunteer attorneys were ineffective.

B. *Ineffective Assistance.*

¶13 Morales-Rodriguez argues her volunteer lawyers were ineffective because they did not understand the law about conflicts and withdrawing deprived her of the counsel of her choice. She claims the trial court erred in denying her postconviction claim without holding an evidentiary hearing.

¶14 Morales-Rodriguez’s motion, however, fails to allege facts that, if true, would entitle her to relief, asserts mostly conclusory allegations, and the record conclusively shows she is not entitled to relief. She alleged that her volunteer attorneys withdrew based on their misunderstanding of the law, resulting in “a deprivation of her structural constitutional right to the counsel of her choice.”

¶15 Morales-Rodriguez’s right to counsel of her choice was not absolute. Here, her volunteer lawyers withdrew due to their potential conflicts of interest. They did not want the potential conflicts to hurt Morales-Rodriguez and their concern about her being unable to validly waive any conflicts was reasonable based on their personal involvement in other Milwaukee County cases. Conflicts and potential conflicts create an exception to a defendant’s right to counsel of choice. *See Peterson*, 314 Wis. 2d 192, ¶13. Her attorneys were acting in her best interests when electing to withdraw so as to allow her to have a “conflict-free” representation without the potential conflict issues lurking in the background. This was certainly not deficient performance.

¶16 Further, it is important to note that this case is distinguishable from *Gonzales-Lopez*, upon which Morales-Rodriguez relies. In *Gonzales-Lopez*, the defendant was deprived of counsel of his choice because the *trial court* would not permit him to represent the defendant. *Id.*, 548 U.S. at 144-150. The lawyer wanted to represent the defendant and the defendant wanted the lawyer to represent him. *Id.* The trial court refused to allow it. *Id.*

¶17 The facts in Morales-Rodriguez’s case are completely distinguishable. Morales-Rodriguez wanted the volunteer attorneys to represent her, but they were not willing to continue as her counsel. They moved to withdraw and had a reasonable basis for doing so. In other words, it was not the *trial court* that prevented Morales-Rodriguez from keeping the volunteer attorneys, it was the attorneys themselves. The trial court could not force the attorneys to stay on her case when they were unwilling to because of a potential conflict of interest. *See Peterson*, 314 Wis. 2d 192, ¶13. Here, the volunteer attorneys did not want to stay on as Morales-Rodriguez’s attorneys because they believed doing so may create a conflict of interest. Morales-Rodriguez does not

cite any case, nor can we locate any, holding that a defendant has a constitutional right to keep an attorney under these circumstances. Accordingly, the trial court correctly denied the motion because Morales-Rodriguez did not allege facts that if true would establish she was deprived of her right to counsel of her choice.

¶18 Moreover, the withdrawal of her volunteer attorneys did not cause prejudice. Morales-Rodriguez was ably represented by two appointed attorneys. She does not complain about their representation and does not argue that they were ineffective for not objecting to the withdrawal of the volunteer attorneys or that they were ineffective for not raising her “right to counsel of her choice” claim. We are satisfied the record conclusively shows Morales-Rodriguez received a fair trial with a reliable outcome and the withdrawal of her volunteer attorneys did not cause her prejudice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

